

Friday, 18 August 2023

## Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (One Minute Read)

**Kerembla Pty Ltd v XL Insurance Company SE, trading as Brooklyn Underwriting (No 2)** (FCA) - Court declined to make a lump sum costs order, as it did not have sufficient confidence in arriving at an appropriate sum on the materials available (I)

**Novartis AG v Pharmacor Pty Limited (No 2)** (FCA) - Court refused to determine a separate issue before trial, as to do so would not have served the overarching purpose of facilitating the just resolution of disputes according to law as quickly, inexpensively, and as efficiently as possible (I B)

**AMP Bank Limited v Doherty** (NSWSC) - defaulting mortgagor's claim that a third party had discharged her indebtedness failed (I B C)

**Mosaic Support Services (Tas) Inc v Woolley** (TASSC) - appeal dismissed against a finding of the Tasmanian Civil and Administrative Tribunal that a worker's incapacity was the result of a work injury (I)

**McCasker v OMAD (NT) Pty Ltd (No 3)** (NTSC) - tavern lease that allowed landlord to purchase tenant's plant and equipment at market value at the end of the lease did not allow for the costs of the licences to operate gaming machines to be included in the market value of those gaming machines (I B)

## HABEAS CANEM

### Puppy manager



# Benchmark

## Summaries With Link (Five Minute Read)

### **Kerembla Pty Ltd v XL Insurance Company SE, trading as Brooklyn Underwriting (No 2) [2023] FCA 970**

Federal Court of Australia

Jackman J

Lump sum costs - the Court had previously made a declaration to the effect that XL was liable to indemnify Kerembla in respect of losses arising from or relating to an incident - Kerembla sought a lump-sum costs order pursuant to r40.02(b) of the *Federal Court Rules 2011* (Cth) in the amount of about \$280,000 - held: paragraph 4.1 of the Costs Practice Note states that the Court's preference, wherever it is practicable and appropriate to do so, is for the making of a lump-sum costs order - however, a lump-sum costs order is not mandated in all instances, and the Court must exercise its discretion - there was no basis on which Kerembla could properly claim indemnity costs from the commencement of the proceeding - the unreasonable failure to accept an offer of compromise is a well-established circumstance justifying an award of indemnity costs, but the question whether rejection of the offer was unreasonable must be assessed in light of the circumstances existing at the time the offer was rejected - it had been reasonable for XL to reject Kerembla's first Calderbank offer, as the amendment to Kerembla's case on which it ultimately succeeded had not been made at that time - that is, on the case as propounded at the time the offer was open for acceptance, Kerembla would have failed - it had been reasonable for XL to reject Kerembla's second Calderbank offer, as the time for acceptance had been too short - therefore, costs should be assessed on a party and party basis - while the appropriate discount applicable to such costs for a lump sum order is often expressed in terms of a rule of thumb in the order of a 30%-35% discount to the actual costs incurred, there was no such evidence before the Court - the Court did not have sufficient confidence in arriving at an appropriate sum on the materials available to make a lump sum costs order - XL to pay Kerembla's costs on the basis as between party and party, as agreed or assessed.

[Kerembla Pty Ltd \(I\)](#)

### **Novartis AG v Pharmacor Pty Limited (No 2) [2023] FCA 963**

Federal Court of Australia

Yates J

Patents - Novartis commenced proceedings, alleging that Pharmacor threatened to infringe claim 1 of a patent it owned, in relation to its apprehended supply of a number of pharmaceutical products entered on the Australian Register of Therapeutic Goods - Pharmacor denied that it threatened to infringe claim 1 and alleged that claim 1 was invalid on a number of grounds - Pharmacor also alleged that the Commissioner of Patents wrongly granted an extension of the term of the patent - Novartis sought the separate determination, pursuant to r30.01(1) of the *Federal Court Rules 2011* (Cth), of whether certain paragraphs of Pharmacor's amended statement of cross-claim alleging invalidity in respect of claim 1 should be dismissed to the extent that Pharmacor made certain allegations of invalidity in respect of the claim - held:

s37M of the *Federal Court of Australia Act 1976* (Cth) required the Court to approach the separate determination issue having regard to the overarching purpose of the Court's civil practice and procedure provisions, which is to facilitate the just resolution of disputes according to law as quickly, inexpensively, and as efficiently as possible - the Court was not persuaded that the just resolution of the substantive question raised by Novartis's separate question, in accordance with the overarching purpose, favoured the hearing of that question separately from and before any other question in the proceeding - the Court was satisfied that the substantive question is best determined in the context of the trial itself - the only consideration favouring the separate and prior determination of the question Novartis proposed was the possibility that ultimately unnecessary evidence might be called at the trial as to whether the "supramolecular complex" was the best method known to Novartis at the relevant dates - however, Pharmacor had assured the court that the evidence it would call on that issue would be relatively limited - the Court was prepared to act on that assurance - application refused.

[Novartis AG](#) (I B)

## **AMP Bank Limited v Doherty [2023] NSWSC 957**

Supreme Court of New South Wales

Harrison J

Possession of land - Doherty was the registered proprietor of a property at Edmondson Park - AMP held a legal mortgage registered over the property, and alleged that Doherty was in default - AMP sought an order for possession of the property and judgment for the outstanding balance of the monies secured by its mortgage - Doherty maintained that the debt had been repaid in full, not once but twice, by a third party - held: Doherty had been unrepresented in the proceedings, and she had not been able to provide any evidence that she had paid any outstanding sum to the bank, or that anyone had done so on her behalf - Doherty deposed that someone described as "Dr David Murphy" had sent an email to the bank advising it that about \$1million had been sent to the bank by electronic funds transfer, presumably in full discharge of her obligations - it seemed that Doherty relied on this email as evidence that the bank had received the monies to which the email referred - AMP did not have any records of any such payment - Murphy had been charged with engaging in dishonest conduct while carrying on a financial services business and making false or misleading statements, in relation to a business that Murphy operated known as Debt Wipeout - Doherty had been thoroughly taken in and duped by Murphy - AMP was entitled to a judgment for the full amount of its secured debt and to an order for possession of the property.

[View Decision](#) (I B C)

## **Mosaic Support Services (Tas) Inc v Woolley [2023] TASSC 27**

Supreme Court of Tasmania

Marshall AJ

Workers compensation - the respondent suffered a lumbar strain injury, being an exacerbation of a pre-existing degenerative condition, in his employment - a medical practitioner certified that the respondent was totally incapacitated for work, and the respondent had not returned to work

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since - the employer accepted liability for the respondent's claim for compensation and commenced to pay him weekly payments under the *Workers Rehabilitation and Compensation Act 1988* (Tas) - the employer later terminated the respondent's weekly payments based on a certificate signed by a medical practitioner which stated that any incapacity the respondent was suffering was no longer wholly or substantially as a result of his work injury - the respondent referred the termination of the weekly payments to the Tasmanian Civil and Administrative Tribunal for determination - the Tribunal found that the respondent's incapacity at the relevant date was the result of the work injury - the employer appealed - held: the Tribunal ultimately found that the work injury suffered by the respondent continued to have ongoing effects such that he remained incapacitated as a result of that injury - therefore, the Tribunal considered the correct test and applied it based on the evidence before it - the Tribunal had not erred by considering the present capacity of the respondent to earn rather than engaging in the speculative exercise of considering what he would be able to earn in suitable employment - read fairly and comprehensively, the Tribunal's reasons were redolent with indications or inferences that it did not accept many aspects of the evidence of the employer's medical experts where it conflicted with critical aspects of the evidence of the respondent's medical experts - the decisions of Tribunals are not meant to be documents perfected by parliamentary draftsmen, and it is inappropriate to trawl through them with a fine tooth comb, looking for error, when the context of what is being said is clear from the entire decision - appeal dismissed.

[Mosaic Support Services \(Tas\) Inc \(I\)](#)

## **McCasker v OMAD (NT) Pty Ltd (No 3) [2023] NTSC 68**

Supreme Court of the Northern Territory

Brownhill J

Contracts - the landlord of a tavern notified the tenant at the end of the lease that he intended to acquire the tenant's plant and equipment in the premises, including 20 gaming machines - the lease provided that, on termination, the landlord may elect to purchase the stock-in-trade and plant and equipment of the tenant in the premises and used for the business - the lease also required the tenant, at termination, to do everything necessary to enable the landlord to obtain the renewal of any licence or permit, or permit the transfer of any licence or permit, to enable the business to continue uninterrupted at the premises - the tenant offered to sell the plant and equipment to the landlord for \$100,000, and the 20 gaming machines with their associated licences for \$1,088,100, on the basis the licences and the machines were said to be inseparable, given the statutory prohibition on possessing a gaming machine without a licence, so the sale price should reflect the cost of obtaining a licence - the landlord considered that the tenant was required to transfer the licenses at no additional cost - the landlord commenced proceedings - held: the terms of a commercial contract are to be understood objectively, by reference to what a reasonable business person in the position of the parties would have understood them to mean - contracts are construed as a whole and, when there is a constructional choice, preference is to be given to a construction supplying a congruent operation to the various components of the whole - the lease had obliged the tenant to conduct the business of hotel keeper (or tavern) under the authority of a liquor licence - the lease had

permitted but not obliged the tenant to operate gaming machines on the premises, as that was a use consistent with conducting the business of hotel keeper under the authority of a liquor licence - there was a term implied for business efficacy into the clause allowing the landlord to purchase the tenant's plant and equipment, requiring the tenant to transfer to the landlord any licences, permits, or other authorities that permitted the plant and equipment to be used for the business, along with possession of the plant and equipment - it would be commercial nonsense for the gaming machine licence to be captured by the licence transfer clause, when the landlord's entitlement to purchase the tenant's plant and equipment (including the gaming machines) under the purchase of plant and equipment clause was optional - under such a construction, if the landlord elected not to purchase the tenant's plant and equipment, the tenant would nevertheless be obliged to transfer to the landlord every licence or permit associated with the plant and equipment which the landlord did not elect to acquire - by the lease, the tenant had agreed to sell its plant and equipment to the landlord if two conditions were satisfied, namely that the lease was terminated and the landlord gave the tenant notice of exercise of the purchase entitlement before termination - those conditions had been fulfilled, and so the landlord had been bound to complete the sale at the price prescribed by the lease, that is, market value - the landlord had not validly terminated those contractual obligations for breach or repudiation - the Court assessed the market value of the 20 gaming machines as \$143,000 and of the other plant and equipment as \$85,000, so that the tenant was entitled to judgment for \$228,000 - the Court was not satisfied, on the balance of probabilities, that the alleged breaches of the lease by the tenant had caused the landlord any loss or damage, and the landlord's claims were dismissed.

[McCasker](#) (I B)



## Poem for Friday

### The Sorceress; or Wolfwold and Ulla

**By:** William Julius Mickle (1734-1788)

'Oh, how he lies; his cold pale cheek  
Lies lifeless on the clay;  
Yet struggling hope – O day spring break  
And lead me on my way.

'On Denmark's cruel bands, O heaven!  
Thy red-wing'd vengeance pour;  
Before my Wolfwold's spear be driven –  
O rise bright morning hour!'

Thus Ulla wail'd, the fairest maid,  
Of all the Saxon race;  
Thus Ulla wail'd, in nightly shade,  
While tears bedew'd her face.

When sudden o'er the fir-crown'd hill,  
The full orb'd moon arose;  
And o'er the winding dale so still,  
Her silver radiance flows.

No more could Ulla's fearful breast,  
Her anxious care delay;  
But deep with hope and fear imprest,  
She holds the moonshine way.

She left the bower, and all alone  
She traced the dale so still;  
And sought the cave with rue o'ergrown,  
Beneath the fir-crown'd hill.

Black knares of blasted oak, embound  
With hemlock, fenc'd the cell:  
The dreary mouth, half under ground,  
Yawn'd like the gate of hell.

Soon as the gloomy den she spy'd,



Cold horror shook her knee;  
And hear, O Prophetess, she cry'd,  
A Princess sue to thee.

Aghast she stood! athwart the air,  
The dismal screech-owl flew;  
The fillet round her auburn hair  
Asunder burst in two.

Her robe of softest yellow, glow'd  
Beneath the moon's pale beam;  
And o'er the ground with yew-boughs strew'd,  
Effus'd a golden gleam.

The golden gleam the Sorceress spy'd,  
As in her deepest cell,  
At midnight's magic hour she try'd  
A tomb o'erpowering spell.

When from the cavern's dreary womb,  
Her groaning voice arose,  
'O come, my daughter, fearless come,  
And fearless tell thy woes.'

As shakes the bough of trembling leaf,  
When whirlwinds sudden rise:  
As stands aghast the warrior chief,  
When his base army flies.

So shook, so stood, the beauteous maid,  
When from the dreary den,  
A wrinkled hag came forth, array'd  
In matted rags obscene.

Around her brows, with hemlock bound,  
Loose hung her ash grey hair;  
As from two dreary caves profound  
Her blue flamed eye-balls glare.

Her skin, of earthy red, appear'd  
Clung round her shoulder bones;  
Like wither'd bark, by light'ning fear'd





When loud the tempest groans.

A robe of squalid green and blue,  
Her ghostly length array'd,  
A gaping rent, full to the view  
Her furrow'd ribs betray'd.

'And tell my daughter, fearless tell,  
What sorrow brought thee here?  
So may my power thy cares expel,  
And give thee sweetest cheer.'

'O Mistress of the powerful spell,  
King Edric's daughter see,  
Northumbria to my father fell,  
And sorrow fell to me.

'My virgin heart Lord Wolfwold won;  
My father on him smil'd  
Soon as he gain'd Northumbria's throne,  
His pride the youth exil'd.

'Stern Denmark's ravens o'er the seas  
Their gloomy blackwings spread,  
And o'er Northumbria's hills and leas,  
Their dreadful squadrons sped.

'Return brave Wolfwold, Edric cried,  
O generous warrior hear,  
My daughter's hand, thy willing bride,  
Awaits thy conquering spear.

'The banish'd youth in Scotland's court,  
Had past the weary year;  
And soon he heard the glad report,  
And soon he grasp'd his spear.

'He left the Scottish dames to weep,  
And wing'd with true love speed;  
Nor day, nor night, he stop'd to sleep,  
And soon he cross'd the Tweed.



# Benchmark

'With joyful voice, and raptur'd eyes,  
He press'd my willing hand;  
I go my Fair, my Love, he cries,  
To guard thy father's land.

'By Edon's shore in deathful fray,  
The daring foe we meet,  
Ere three short days I trust to lay  
My trophies at thy feet.

'Alas, alas, that time is o'er,  
And three long days beside,  
Yet not a word from Edon's shore,  
Has cheer'd his fearful bride.

'O Mistress of the powerful spell,  
His doubtful fate decide;' –  
'And cease my child for all is well,'  
The grizly witch replied.

'Approach my cave, and where I place  
The magic circle, stand  
And fear not ought of ghastly face,  
That glides beneath my wand.'

The grizly witch's powerful charms,  
Then reach'd the labouring moon,  
And cloudless at the dire alarms,  
She saw her brightest noon.

The pale beam struggles thro' the shade,  
That black'd the cavern's womb,  
And in the deepest nook betray'd  
An altar and a tomb.

Around the tomb in mystic lore,  
Were forms of various mien,  
And efts, and foul wing'd serpents, bore  
The altar's base obscene.

Eyeless, a huge and starv'd toad fat  
In corner murk aloof,



And many a snake and famish'd bat  
Clung to the crevic'd roof.

A fox and vultures' skeletons,  
A yawning rift betray'd;  
And grappling still each other's bones,  
The strife of death display'd.

'And now my child, the Sorceress said,  
Lord Wolfwold's father's grave,  
To me shall render up the dead,  
And send him to my cave.

'His skeleton shall hear my spell,  
And to the figur'd walls  
His hand of bone shall point and tell,  
What fate his Son befalls.'

O cold down Ulla's snow like face,  
The trembling sweat drops fell,  
And borne by sprights of gliding pace,  
The corse approach'd the cell.

And thrice the Witch her magic wand  
Wav'd o'er the skeleton;  
And slowly at the dream command,  
Up rose the arm of bone.

A cloven shield and broken spear,  
The finger wander'd o'er,  
Then rested on a sable bier  
Distain'd with drops of gore.

In ghastly writhes, her mouth so wide,  
And black the Sorceress throws,  
'And be those signs, my child,' she cries,  
'Fulfill'd on Wolfwold's foes.

'A happier spell I now shall try;  
Attend, my child, attend,  
And mark what flames from altar high,  
And lowly floor ascend.



'If of the rose's softest red,  
The blaze shines forth to view,  
Then Wolfwold lives – but Hell forbid  
The glimmering flame of blue!

The Witch then rais'd her haggard arm,  
And wav'd her wand on high;  
And while she spoke the mutter'd charm,  
Dark lightning fill'd her eye.

Fair Ulla's knee swift smote the ground;  
Her hands aloft were spread,  
And every joint as marble bound,  
Felt horrors darkest dread.

Her lips ere while so like the rose,  
Were now as vi'let pale,  
And tumbling in convulsive throes,  
Exprest o'erwhelming wail.

Her eyes, ere while so starry bright,  
Where living lustre shone,  
Were now transform'd to sightless white,  
Like eyes of lifeless stone.

And soon the dreadful spell was o'er,  
And glimmering to the view,  
The quivering flame rose thro' the floor  
A flame of ghastly blue.

Behind the altar's livid fire,  
Low from the inmost cave,  
Young Wolfwold rose in pale attire,  
The vestments of the grave.

His eye to Ulla's eye he rear'd,  
His cheek was wan as clay,  
And half cut thro' his hand appear'd  
That beckon'd her away.

Fair Ulla saw the woeful shade



Her heart struck at her side  
And burst – low bow'd her listless head,  
And down she sunk and died.

**William Julius Mickel** (earlier Meikle) was born on 29 September 1734 in Langholm, in Dumfriesshire, Scotland, the son of a minister, Rev Alexander Meikle who had been employed in the translation of Baye's Dictionary and was Williams' first teacher. After his father's early death he lived with an Aunt, and her husband, an eminent brewer in Edinburgh. William became a brewer, but after the business failed and William became bankrupt in 1763, he worked in England for the Clarendon Press at Oxford. His literary career was marked by failures and some minor recognition, until his translation from Portuguese to English of the poem *Lusiad*, by Luis de Camoes for which he became well known and which gave him an income. He travelled to Portugal in 1777 where he was well received. His best known poem is "*There's nae luck about the Hoose*", although it has also been suggested the song was written by Jean Adam (1704-1765). He died on 28 October 1788 in Forest Hill.

**There's Nae Luck about the House**, arr. By Gordon Langford sung by The King's Singers, 1985

<https://www.youtube.com/watch?v=4nXEtJEAO84>

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